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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MARINE ENGINEERS BENEFICIAL ASSOCIATION,
No. 13

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 3, 1953 (R. 56–57), which set aside an order of the Board issued with their consent against the United Marine Division, Local 333–A, International Longshoremen's Association, AFL, and William V. Bradley, vice president, International Longshoremen's Association, AFL.

OPINIONS BELOW

The opinion of the court below (R. 50–56) is reported at 202 F. 2d 546. The proceedings before the Board are unreported.

JURISDICTION

The judgment of the court below was entered on April 3, 1953 (R. 56–57). The jurisdiction of this

Court is invoked under 28 U. S. C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Following issuance of a complaint alleging the commission of unfair labor practices, the National Labor Relations Board's General Counsel and the alleged offenders agreed to a settlement which was approved by the Board and on the basis of which the Board entered an order prescribing measures to remedy the practices alleged. The party who had filed the charge leading to the complaint objected to the order, demanding that, unless a settlement could be effected on terms it deemed acceptable, the Board should hold a hearing and resolve the issues only after a contested proceeding. The question presented is whether, after a complaint has issued, the charging party's objection precludes the Board from conclusively terminating the case by an order entered pursuant to a settlement with the alleged offender.

STATUTES AND RULES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*), and of the Board's Rules and Statements of Procedure are set forth in Appendix A, *infra*, pp. 24–32.

STATEMENT

A charge was filed on December 31, 1951 (R. 1a–4a) (and amended on January 30, 1952, R. 5a–8a),

by Marine Engineers Beneficial Association No. 13, hereafter called M. E. B. A., against United Marine Division, Local 333–A, International Longshoremen's Association, AFL, and William V. Bradley, vice president, International Longshoremen's Association, AFL, hereafter collectively called I. L. A. On April 21, 1952, on the basis of this charge, the Regional Director of the Board's Fourth Regional Office issued a complaint alleging that I. L. A. had violated Section 8 (b) (4) (A) of the Act (R. 9a–12a), insofar as that section makes it an unfair labor practice for a labor organization or its agents:

> To engage in, or to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is:
>
> (A) forcing or requiring any employer * * * to join any labor * * * organization * * *.

The allegations of the complaint may be summarized as follows: Beginning on October 2, 1951, I. L. A. had demanded of various tugboat companies or operators in the Philadelphia area that they enter into a collective bargaining agreement with I. L. A. which would require the licensed engineers employed by the tugboat owners to join the I. L. A. (R. 10a). On and after December 16, 1951, I. L. A. induced and encouraged employees of the operators to strike in order to force the operators to enter into such an agreement (R. 10a–11a). As a result of this inducement to strike, on December 26, 1951, the operators signed a contract with I. L. A. requiring the licensed engineers to join that organization (R. 11a). The

complaint alleged further that the licensed engineers, by virtue of their status as ship's officers and agents of the operators, were "employers" within the meaning of Sections 2 (2) and 8 (b) (4) (A) of the Act (R. 10a), and hence that I. L. A. had violated Section 8 (b) (4) (A) by inducing employees of the operators to strike in the course of their employment for the purpose of requiring employers (*i. e.*, licensed engineers) to join a labor organization (R. 11a).

On May 6, 1952, after issuance of the complaint, a stipulation was executed between I. L. A. and counsel for the General Counsel of the Board, with the assent of the tugboat operators, incorporating the terms of a settlement of the complaint, subject to Board approval (R. 13a–21a). Under the settlement I. L. A., without admitting the commission of the unfair labor practices alleged in the complaint, consented to the entry of a Board order and an enforcement decree in an appropriate Court of Appeals. The order provides that I. L. A. shall not: (1) engage in or induce the employees of the operators to engage in a strike, where an object thereof is either (a) to force or require the engineers to join the I. L. A., or (b) to force or require the operators to comply with the provisions of the December 26, 1951, agreement insofar as it applies to engineers; (2) enforce or give effect to the agreement insofar as it applies to engineers; or (3) demand recognition as exclusive representative of the engineers, or negotiate for such recognition, for a period of sixty days from the date of the Board's order. Affirmatively, the order re-

quires I. L. A. to post notices reciting in detail that it will not engage in the conduct proscribed by the order.

While the settlement was pending before the Board for its approval, M. E. B. A. filed a statement of objections to the settlement, urging that the "proposed stipulation does not provide the remedy which the charging party believes would have been accorded by the Board" after a contested proceeding (R. 22a). M. E. B. A. suggested three amendments to the order: (1) prohibit I. L. A. from requesting or demanding an agreement with the tugboat operators requiring the licensed engineers to join the I. L. A. as a condition of employment (R. 22a–24a, 28a); (2) rescind and nullify from its inception the agreement between the I. L. A. and the tugboat operators insofar as it applies to the licensed engineers (R. 24a–25a, 28a); and (3) require I. L. A. to mail to each licensed engineer a letter stating that he is not required to join that organization (R. 25a, 28a–29a, 30a).[1] M. E. B. A. urged the Board not to approve the settlement, "but instead return the case to the General Counsel with leave to him" either to settle the case on M. E. B. A.'s terms or to proceed to prosecute the complaint (R. 22a).

The Board considered and rejected M. E. B. A.'s objections to the settlement and on August 15, 1952, entered the order as agreed upon by I. L. A. and the

[1] In the court below, M. E. B. A. abandoned its claim concerning the mailing of individual letters to the licensed engineers.

General Counsel, and assented to by the tugboat operators, "because of its conclusion" that acceptance of the settlement "will effectuate the policies of the Act" (R. 35a, n. 1, 34a–40a).[2] On September 24, 1952, M. E. B. A. filed its petition for review in the court below, requesting that the court set aside the Board's consent order and remand the case to the Board with "directions to the Board to proceed with a hearing upon the complaint * * * with leave to the Board not to hold a hearing if it or its General Counsel is able to secure a new stipulation" in keeping with M. E. B. A.'s views (R. 41, 46).

In its decision of March 10, 1953, the court below set aside the Board's order and remanded the case to the Board for further proceedings (R. 50, 56). While agreeing that the Board may effectuate a conclusive settlement without the charging party's assent before the issuance of a complaint or after the entry of a final order (R. 52, n. 3), the court held that the Board is without power to do so in the intermediate procedural stage after issuance of the complaint. At that juncture, the court held, the charging party "does have some standing," and unless it consents to a settlement, it is "entitled to a hearing" so it can make a record resulting in an order capable of "court review on the questions of fact and on the

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[2] Shortly thereafter the Board filed a petition in the court below for entry of a consent decree enforcing this order. *N. L. R. B.* v. *United Marine Division, Local 333–A, I. L. A., A. F. L., et al., No. 10,887.* The court below, on motion of the Board, has postponed consideration of this petition until disposition of the instant proceeding.

questions of law" (R. 55). The court based its conclusion on its views concerning (1) the Board's rules and practice (R. 53); (2) the right to obtain judicial review of a final order accorded by Section 10 (f) of the National Labor Relations Act to a person aggrieved by a denial of relief (R. 53); and (3) the requirements of Sections 5 (b) and 6 (a) of the Administrative Procedure Act (R. 54-55).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that an objection of the charging party precludes the Board from effectuating a conclusive settlement after a complaint has been issued.

2. In failing to deny the petition to review and set aside the Board's order entered with the consent of the alleged offenders.

REASONS FOR GRANTING THE WRIT

In issue is the question whether, after a complaint has been brought alleging the commission of unfair labor practices, the Board and the alleged offender may enter into a settlement of the complaint conclusively terminating the case if the party charging the commission of the unfair labor practices withholds consent to the settlement. Under the decision below, unless the party who filed the charge consents, the Board may not approve a settlement with the alleged offender and enter a final order based upon such settlement, but must hold a hearing and prosecute the complaint as if there had been no

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agreement to settle. The decision rests upon the premise of the court below (R. 55) that a Board order resulting from a settlement is reviewable in court at the instance of the charging party, and that there must therefore be a record upon which such review can be based.

As the court below observed (R. 51), the question is one "of obvious importance" and "one which is not settled so far as the parties or we have been able to discover." Recognizing that settlement is the "life-blood of the administrative process" (Final Report, Atty. Gen. Comm. Admin. Proc., Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 35), the Board "has from the very beginning encouraged compromises and settlements" (*Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248, 253–254; and see *Poole Foundry & Machine Co.* v. *National Labor Relations Board*, 192 F. 2d 740, 742 (C. A. 4), certiorari denied, 342 U. S. 954). Sharply curtailing the Board's power in this significant area, the decision below rests, in our view, upon misconstruction of both the National Labor Relations Act and the Administrative Procedure Act. We submit that there is need for review by this Court.

1. It is necessary at the outset to describe (a) the types of settlement evolved by the Board, (b) the Board's practice of making settlements without the assent of the charging party, and (c) the considerations which go to determining the acceptability of a settlement.

a. The Board employs two broad types of settlement, called "formal" and "informal" adjustments. A formal adjustment, like the one in this case, is one in which the Board enters an order with the alleged offender's consent; depending on the agreement reached, it may or may not provide for the entry of a consent decree enforcing the order. In an informal adjustment, on the other hand, the settlement agreement is not incorporated in an order, but is reduced to writing, and the case is closed on compliance with the terms of the settlement. "Since a stipulation for a Board order or consent decree is permitted only if a complaint has issued, it is necessary where a formal order is agreed upon by the parties, to arrange for the authorization and issuance of a *pro forma* complaint before Board approval is given to the settlement." Mon. Atty. Gen. Comm. Admin. Proc., N. L. R. B., S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., p. 8, n. 33. "After the complaint has been issued, the respondent, upon admitting only the facts of his business from which the Board may find that he is engaged in interstate commerce, may consent to the entry of an order specifying the practices which he agrees to cease and the affirmative action which he agrees to take. He is not required to admit any facts concerning the practices alleged in the complaint. The Board then makes findings that he is engaged in interstate commerce, that a complaint has been issued, and that the stipulation * * * has been made; the Board thereupon issues the order agreed upon in

the stipulation and no further findings concerning the facts or the alleged violations are made." Final Report, Atty. Gen. Comm. Admin. Proc., Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 42.

Each stage of an unfair labor practice proceeding, from the filing of a charge through the final step of negotiating compliance with the terms of a contempt judgment, presents an occasion for consent adjustment. Extraordinary circumstances aside, no complaint issues except after exploration of the possibility of settlement, and even after issuance of the complaint, "the parties * * * have full opportunity at every stage to dispose of the case by amicable adjustment * * *." [3] At any procedural stage the adjustment reached may be either formal or informal. If a formal adjustment is agreed upon before a complaint has been brought, a *pro forma* complaint is issued to provide the jurisdictional basis for the entry of the consent order (as well as an enforcing decree when the settlement calls for it). If an informal adjustment is agreed upon after a complaint has been issued, the Regional Director of the Board who brought the complaint withdraws it as part of the settlement.

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[3] N. L. R. B., Statements of Procedure, Sec. 101.7, 101.9, in 29 CFR 41–42 (1949). For reported cases in which settlement was effected at a late stage in the proceeding, see e. g. *Fickett-Brown Mfg. Co.*, 52 N. L. R. B. 32, enforced, 140 F. 2d 883 (C. A. 5) (after hearing); *Fred Rueping Leather Co.*, 24 N. L. R. B. 1086 (after trial examiner's report); *Pittsburgh Plate Glass Co.*, 8 N. L. R. B. 1210, noted in 313 U. S. 146, 159–160 (after hearing).

b. The consent of the charging party to a settlement is uniformly sought but not always obtained. See Mon. Atty. Gen. Comm. Admin. Proc., N. L. R. B., S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., p. 7, n. 29. Where the charging party's assent cannot be obtained, but the Board nevertheless is of the view that the settlement best conduces to effectuate the policies of the Act, the settlement is taken.

This has been the Board's practice for at least a decade. It is recorded in the Board's Field Manual for January 15, 1944, codifying the agency's policies, practices, and procedures for the guidance of its staff. With respect to formal adjustments, while stating that the "parties to the stipulation must include the respondent, the charging party, the Board's attorney or Field Examiner or both, and any intervenor," the manual expressly notes that (Appendix B, *infra*, p. 35, n. 1):

> In exceptional situations, a formal settlement may be concluded *without* agreement of the charging party. In this event, adequate means must be afforded the charging party to make known its objections to the Board. [Emphasis supplied.]

The same is true of informal adjustments. While observing that the "employer and the charging union should ordinarily both be parties to the agreement," the manual states further that (Appendix B, *infra*, p. 35):

> However, it will be noted that a form (N.L.R.B. 283) is provided for use in those cases where the employer offers appropriate affirmative

> remedial action which the union is unwilling to accept. This form should be used sparingly and only after the Field Examiner has used every reasonable effort to persuade the union to accept the proferred compliance.

The form referred to was contained in Field Division Instruction No. 45, issued more than a year before, on December 18, 1942 (Appendix B, *infra*, pp. 36–37). The practice of disposing "of cases that are settled informally by agreements between the Regional Director and respondent where the charging party is unwilling to be a party to the settlement" was earlier mentioned in a memorandum of May 29, 1941, in a context indicating its settled usage (Appendix B, *infra*, pp. 41–42). Even before then individual Board members had occasion to explain that settlements without the consent of the charging party were necessary to effectuation of the Act's policies.[4] In short, the practice of taking settle-

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[4] Former Board Chairman J. Warren Madden, now on the bench of the United States Court of Claims, early explained in reply to an objection that charging unions were obliged to accept compromises arranged by the Board: "* * * there [is] no way in which an administrative agency could be compelled to litigate against its own judgment. The word of the Labor Board in such matters * * * is final." 5 L. R. R. M. 1163, 1166 (1939–1940). Another former Board member explained in 1940 that:

"It must be borne in mind that the processes of the Act were not designed to adjudicate private rights but to establish public policy. In the belief that substantial compliance with the purposes of the Act and a substantial opening up of the channels of self-organization, free from the employer's interference, has been accomplished by a particular settlement, the Board and its agents are fully warranted, we feel, in making settlements which may represent to indi-

ments over the objection of a charging party is no current innovation but is long-standing with the Board.[5]

c. Underlying the determination whether to accept the terms of settlement, despite the charging party's refusal to assent, is a balance of many factors to be weighed in the scales of the public interest in advancing the policies of the Act. For example, judgment must be exercised to determine whether the charging party's objections stem more from its zeal than from the inadequacy of the settlement, and whether on that account the charging party is seeking more than the circumstances fairly warrant; whether lesser immediate relief by settlement will do more to redress and prevent the unfair labor practices than greater relief delayed by litigation; whether measuring the risks of protracted litigation against its advantages, including estimates of the sufficiency of proof and the soundness of the legal position, the balance pre-

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viduals a diminution of what they might receive if the case were litigated" (address before Harvard Law School students, March 8, 1940, N. L. R. B. Release No. R.–2728).

[5] When the court below stated that the early "policy of the Board" had not been established by evidence that was "conclusive" (R. 55), it did so without benefit of the documents mentioned in the preceding paragraph, only the statement of Board Chairman Madden having been called to its attention (see preceding note). The court was influenced by the description of Board settlement procedures contained in Rosenfarb, *The National Labor Policy and How It Works*, pp. 486, 518, published in 1940, which the court read to indicate that the Board "uniformly" obtains the charging party's assent (R. 54). The author's description, if not incomplete as of 1940, is certainly incomplete as of a few years later.

ponderates in favor of adjustment over contest; and whether evaluating the sufficiency of the settlement in the light of the demands on the agency's overall capacity, limited budget and personnel are better devoted to other cases. See Mon. Atty. Gen. Rep. Admin. Proc., N. L. R. B., S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., p. 7, n. 30.

2. The court below holds that, in the intermediate procedural stage after issuance of the complaint and before entry of a final order, no settlement may be reached by the Board with the alleged offender over the objections of the charging party. This means that no formal adjustment can ever be effectuated without the charging party's assent because the indispensable procedural prerequisite for such an adjustment is the issuance of a complaint. It seems to mean, moreover—on the view of the court below (R. 55) that once a complaint is issued the charging party "is entitled to have a chance to be heard"—that not even an *informal* adjustment is possible in the absence of the charging party's consent after the issuance of a complaint. These limitations carve a serious inroad into effective settlement practice.

During the calendar year ending December 31, 1952, of a total of 894 informal adjustments made *before* complaint, 76 were unilateral (*i. e.*, effected without the consent of the charging party). During the same period, of a total of 153 adjustments *after* complaint, 11 were unilateral. Of these post-complaint adjustments, 81 were formal and 72 were informal; of the formal adjustments, 6 were unilateral,

and of the informal adjustments (involving withdrawal of the complaint by the Regional Director), 5 were unilateral.[6]

Considering only these figures, preclusion of unilateral post-complaint adjustments constitutes a substantial impairment of the Board's settlement practice. However, more significant than the past frequency of such settlements is the potentiality for seriously curtailing the future rate of post-complaint adjustments once charging parties learn that they may block a settlement by their naked veto of it. For the decision below means not merely that a settlement could be prevented when there is a reasonable difference of opinion between the agency and the

[6] During this period, since the agency closed a total of 5,399 cases, the adjustments constituted about 20 percent of the total. When to these adjustments, representing redress secured on meritorious charges, there is added the 2,670 cases in which the agency induced voluntary withdrawal of baseless charges, the rate increases to about 70 percent. An additional 1,227 charges, or about 23 percent of the total cases, were dismissed as without merit before complaint, with the result that only about 7 percent of all the charges filed culminated in a final order of the Board entered after a fully contested proceeding.

This summary was compiled from statistics furnished by the Board's Administrative Statistics Branch as supplemented by the results of a questionnaire addressed to the Board's Regional Directors. The estimate given by the Board to the court below, "that 5 percent of the settlements are effected over the objections of the charging party" (R. 51), proves to have been conservative, the actual overall figure being better than 7 percent. For comparable figures for the fiscal year ending June 30, 1951, but not including the rate of unilateral settlement, see N. L. R. B., *Sixteenth Annual Report*, p. 299.

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charging party; the settlement could not be effectuated no matter how unreasonable the charging party might be. Past experience indicates that a charging party's consent is not infrequently withheld for no better reasons than personal pique, arbitrary attitudes, motives of vengeance, or the desire to use the hearing as a forum for airing grievances and obtaining prestige-enhancing publicity.

To say, therefore, that the mere objection by the charging party to a post-complaint adjustment without more suffices to block the settlement is to say that the Act makes the judgment of the private complainant, preoccupied with serving his own interests, superior to the administrative judgment, based on "disinterested, public interest standards and expertness," [7] in determining the acceptability and timing of a settlement. There is, we submit, no warrant for superseding administrative control in this field.

3. a. A view of the scheme of the National Labor Relations Act as an integrated whole requires the conclusion that the charging party's consent to a settlement is unnecessary at any stage. The court below agreed that *before* the issuance of a complaint the Board may effectuate a settlement without the charging party's assent, for "the Board does not have to issue a complaint except in the exercise of its sound discretion, and * * * its discretion in this respect is not subject to court review" (R. 52).

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[7] *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 751.

The court likewise agrees that, after the Board enters a final order in a contested proceeding, if the Board "decides against enforcement, or decides to negotiate a compromise rather than strict compliance, the decision is not generally reviewable" (R. 52, n. 3). Yet the court holds that the charging party has standing to block a settlement after issuance of the complaint despite his incapacity to do so either before the issuance of the complaint or after the entry of a final order.

There is no basis for such a distinction. From the standpoint of the charging party, a settlement reached before the issuance of a complaint or after the entry of a contested order may be just as unsatisfactory as a settlement concluded after the issuance of a complaint. Since the charging party cannot contest the settlement at the inception or the conclusion of the proceeding, there is no reason for supposing that the Act accords him greater standing in midstream, for his interest in the outcome is identical throughout.

The court below finds "quite a little, though not overwhelming, proof of the correctness" of its holding "in the practice of the Board itself. Its rules and regulations permit the charging party to be listed as a party to the proceedings from the outset instead of relegating him to intervention" (R. 53), and should a case be noticed for hearing, the Board's rules confer on a charging party "the right to appear * * *, to call, examine and cross-examine witnesses, and to

introduce into the record documentary evidence" (R. 53, n. 5).

But this analysis of the Board's practice overlooks the critical fact that this very practice has uniformly denied a charging party the power to prevent a settlement by withholding his consent. In the evolution of litigation practices, from its first through its most recent rules, the Board has, it is true, designated the person filing charges a "party" to the proceeding and accorded him full participation at the hearing of a contested complaint.[8] At the same time, however, in the evolution of settlement practices, the Board has not regarded the consent of the charging party as necessary to the effectuation of a settlement at any stage (*supra*, pp. 11-13). As to settlement, the Board's rules confer on a charging party only an "opportunity to submit * * * facts, arguments, offers of settlement, or proposals of adjustment."[9]

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[8] N. L. R. B., Rules and Regulations, Series 1, Art. II, Secs. 5 and 24, Sept. 14, 1935; *Id.*, as amended, Secs. 5 and 25, April 27, 1936; N. L. R. B., Rules and Regulations, Series 2, Secs. 5 and 25, July 14, 1939; *Id.*, as amended, March 13, 1940, April 22, 1941, Sept. 6, 1941, Oct. 28, 1942; N. L. R. B., Rules and Regulations, Series 3, Secs. 5 and 25, Nov. 26, 1942; *Id.*, as amended, July 12, 1944; N. L. R. B., Rules and Regulations, Series 4, Secs. 203.11, 203.31, Sept. 11, 1946; N. L. R. B., Rules and Regulations, Series 5, Secs. 203.8, 203.38, Aug. 22, 1947; *Id.*, as amended, Aug. 18, 1948; N. L. R. B., Rules and Regulations, Series 6, Secs. 102.8, 102.38, March 1, 1951; *Id.*, as amended, June 3, 1952.

[9] N. L. R. B., Rules and Regulations, Series 6, as amended, Sec. 102.51, June 3, 1952, in 29 CFR 78 (1952 Supp.); N. L. R. B., Statements of Procedure, Secs. 101.7, 101.9, June 3, 1952, in 29 CFR 41–42.

In a word, the Board's practice, instead of supporting the decision below, is inconsistent with it.

Furthermore, the statute itself negates the inference drawn by the court below from the fact that under the Board's rules a charging party may participate in the hearing of a contested complaint. According to Section 10 (b) of the NLRA only the person against whom the complaint runs "shall have the right to file an answer to the * * * complaint and to appear * * * and give testimony at the place and time fixed in the complaint." As to all others, including the charging party, "in the discretion of the * * * Board, any other person may be allowed to intervene in the said proceeding and to present testimony."[10] Consequently, a charging party participates in a hearing by leave of the Board in the exercise of its discretion, and not as of right. It by no means follows from this permissive participation that the charging party has an interest requiring his consent to a settlement. Cf. *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119–120. Nor does the mere fact that a person has filed a charge indicate that he has any interest, for "Anyone can file a charge" (*Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10)), there being no "limitation on the classes of persons"

[10] See *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362–363; *Oughton* v. *National Labor Relations Board*, 118 F. 2d 486, 495–496 (C. A. 3), certiorari denied, 315 U. S. 797; *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 393 (C. A. 8), certiorari denied, 332 U. S. 758.

competent to file charges with the Board. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 17.

As additional grounds for its decision, the court below reasons that under Section 10 (f) of the NLRA "Any person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought may obtain a review of such order"; that judicial review can be exercised only on the basis of a record made in a contested proceeding; and that a settlement of the complaint, since it is effectuated without such a record, deprives the nonassenting charging party as a person aggrieved of the means to contest the adequacy of the remedy (R. 53).

The emphasis placed on the availability of judicial review of the merits of a final order entered after a contested proceeding is misplaced. What is significant, as Section 10 as a whole makes clear, is that Congress limited such review to an order based upon and confined to the facts spread on the record of a contested proceeding, a situation where there is no impediment to judicial supervision and little reason to withhold it. But it is quite another thing to infer that, because no other order is susceptible to judicial review, Congress intended to compel the agency to pursue only that course which would culminate in a reviewable order. When the agency decides to accept a settlement instead of prosecuting the complaint it brought, it exercises the same administrative judgment—extra-judicial in character—which obtains when it decides to accept a settlement rather

than to issue a complaint in the first instance or to enforce a final order in the last instance. And the same reasons apply at each stage for finality of the administrative settlement. The fact that a formal settlement, which necessarily follows issuance of a complaint, is embodied in an "order" affords no ground for singling out this single type of compromise as being subject to the control of the charging party.

b. Without elaboration the court below holds, finally, that the provisions of Section 5 (b) and 6 (a) of the Administrative Procedure Act (APA) "are in point" (R. 54).

Paraphrasing the language of Section 5 (b), the court below evidently reads this provision to mean that when "the parties are unable * * * to determine * * * [the] controversy by consent," it is obligatory for the Board to give the person filing the charge, as one of the "*interested parties*," an opportunity for "hearing and decision upon notice * * *." But the court overlooks the definition of the term "party" contained in Section 2 (b) of the APA.

Section 2 (b) of the APA distinguishes between those persons who are "entitled *as of right* to be admitted as a party" and those who are "named or admitted as a party" in the agency's discretion. The participation of the latter class in any agency proceeding may be restricted to "limited purposes." After distinguishing between participation "as of right" and permissive participation, the APA goes no further. It provides no answer to the question whether and to what extent a person is a party "as of

right"; on this issue the basic statute under which the agency operates controls. Under the NLRA, as we have shown (*supra*, pp. 16–21), a person filing a charge is not "entitled as of right to be admitted as a party." Hence, his status as a party falls within the alternative classification specified by Section 2 (b) of the APA. That is, he is within the class "named or admitted as a party" by the agency, and his participation may therefore be restricted by the agency to "limited purposes." This being so, the Board may properly confine a charging party's participation in settlement to the "limited purposes" of being heard on the settlement without conditioning its effectuation on obtaining the charging party's consent.

The part of Section 6 (a) which the court below invokes provides that:

> Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding.

The right to "appear" connotes no more than the opportunity to be heard. Such an opportunity is invariably accorded a charging party before a settlement is finally taken over his objection. To appear, however, does not mean to prevail, which is the effect of giving the charging party the final say on the acceptability of a post-complaint settlement.

CONCLUSION

For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

JUNE 1953.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151, *et seq.*), are as follows:

> [SEC. 8] (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization * * *
>
> * * * * *
>
> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.
>
> * * * * *
>
> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *. Any such complaint may

be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served

on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the

Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the

United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact it supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

2. The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. § 1001, *et seq.*) are as follows:

SEC 2. As used in this Act—

* * * * *

(b) *Person and party.*—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admit-

ted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

* * * * *

[SEC. 5] (b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * * *

SEC. 6. Except as otherwise provided in this Act—

(a) *Appearance.*—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. * * *.

3. The pertinent provisions of the Board's Rules and Regulations, Series 6, in effect at the times involved in this proceeding, are as follows:

> SEC. 102.8 *Party.*—The term "party" as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8 (a) (1) or 8 (a) (2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.
>
> * * * * *
>
> SEC. 102.38 *Rights of parties.*—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner, and provided further that documentary evidence shall be submitted in duplicate.
>
> * * * * *
>
> SEC. 102.51 *Settlement or adjustment of issues.*—At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director with whom the

charge was filed, for consideration, facts, arguments, offers of settlement, or proposals of adjustment.

* * * * *

4. The pertinent provisions of the Board's Statements of Procedure, in effect at the times involved in this proceeding, are as follows:

SEC. 101.7 *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for the withdrawal of the charge by the complainant at such time as the respondent has complied with the terms of the settlement agreement. Proof of such compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

* * * * *

SEC. 101.9 *Settlement after issuance of complaint.*—(*a*) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even

begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(*b*) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulation also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(*c*) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition that court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

APPENDIX B

1. Excerpt from N. L. R. B. Manual of practices, procedures, and policies for the guidance of the Board's staff, dated January 15, 1944:

TYPES OF ADJUSTMENT

Definitions.—There are two types of adjustment, formal and informal. Formal adjustments are those which result in the issuance of either a Board order or a Board order and consent court decree. Informal adjustments are those which are effected through a simple agreement of the parties, approved by the Regional Director.

The majority of adjustments are of the informal type. If the employer's good faith and his intention not to engage in further violation of the Act seem clear, the informal type of adjustment is adequate.

The formal type of adjustment is to be preferred in 8 (2) cases and in other cases where the employer has wilfully and repeatedly engaged in flagrant violations of the Act. The decision as to whether to require a formal adjustment requires the exercise of discretion and judgment on the part of the regional staff.

It should be borne in mind that where there is nonperformance with the provisions of a consent decree, contempt action will ordinarily be in order. Where there is non-performance with a simple settlement agreement, the remedy lies in the issuance of a Complaint, in which event the case must be tried upon its merits—not on the matter of non-performance with the agreement.

Formal adjustments.—All formal adjustments require the issuance and service of a

complaint prior to or simultaneously with the signing of the settlement stipulation. The assistance of the regional legal staff should always be secured in this connection. As a minimum, the adjustment must provide for a stipulated Board order. However, a stipulated Board order standing by itself is of little value unless it is implemented by a Circuit Court consent decree. Not only does the consent decree provide a means for enforcement of the stipulated order, but it also serves as an effective deterrent to future violations. There are instances where respondent will only agree to a stipulated Board order. This problem may be met by respondent stipulating an admission of the allegations contained in the complaint or by admitting them in a formal answer to the complaint. Upon the basis of the admissions, the Board can then make findings of fact, with which to support the order. Supported by such findings, the order presumably could be enforced in the usual manner. In the absence of consent thereto, however, respondent would have the right to contest the entry of an enforcement decree. If consent to the decree is obtained as a part of the stipulation, no admission of unfair labor practices need be made by the respondent. The formal adjustment with a consent decree is usually the most desirable form of adjustment.

Stipulations for settlement providing for the entry of a Board order and Court decree must be expressly subject to Board approval and must contain (1) a statement of jurisdictional facts, (2) express consent to the entry of a Board order in specified terms, including waiver of rights to hearing and making of findings of fact and conclusions by the Board, and (3) express consent to the entry by the appropriate Circuit Court of Appeals of an en-

forcement order embodying the terms of the Board order, and preferably waiving further notice of the application therefor.

The parties to the stipulation must include the respondent, the charging party,[1] the Board's attorney or Field Examiner or both, and any intervenor.

Any stipulation providing for an affirmative order to bargain collectively should include a description of the bargaining unit agreed upon as being appropriate and an agreement that the labor organization involved represents a majority of the employees in the unit.

Informal adjustments.—An informal settlement may be made by use of a simple agreement without complaint, Board order, or decree. Such agreement should be reduced to writing, preferably on the appropriate standard form. These forms appear in Section 2 of the Forms Manual. The printed provisions on the forms represent the minimum settlement standards for the typical case. Additional provisions should be added where necessary to meet particular fact situations. The employer and the charging union should ordinarily both be parties to the agreement.[2] However, it will be noted that a form (N. L. R. B. 283) is provided for use in those cases where the employer offers appropriate affirmative remedial action which the union is unwilling to accept. This form should be used sparingly and only after the Field Examiner has used every reasonable effort to persuade the union to accept the proffered compliance.

[1] In exceptional situations, a formal settlement may be concluded without agreement of the charging party. In this event, adequate means must be afforded the charging party to make known its objections to the Board.

[2] In certain cases, such as collusive contract cases, other interested persons must also be made parties to the settlement.

Recommendation to accept adjustment.—If the Field Examiner feels that the employer's offer of settlement is consistent with the facts developed by the investigation, he should recommend acceptance of the offer. This recommendation should be in the form of a report, clearly setting forth a comprehensive account of the violation and the degree of relief being offered. Available evidence to support the charge should be summarized, concluding with the basis for the Field Examiner's recommendation. Ordinarily, no informal adjustment should be recommended which is not reduced to writing on the appropriate settlement form or its equivalent and which does not provide for the posting of appropriate notices for a period of at least 60 consecutive days.

2. Field Division Instruction No. 45:

DECEMBER 18, 1942.

To: All Regional Directors.
From: Oscar S. Smith, Director, Field Division.
Subject: Standard Settlement Agreements and Notices.

At the present time most regional offices are disposing of practically all adjusted cases by means of written settlement agreements. However, since each region has devised it own types and standards of agreements, there exists substantial divergence of practice. While some offices make use of printed or mimeographed settlement agreements, others use a standard model which is copied and altered to suit particular cases at the time of settlement. Furthermore, in addition to differences of settlement standards and types, there also exists material differences in the form and content of employer notices.

In implementing the Board's policy of uniform written settlements, a study has been made of most of the printed and model agreements now in use. Based on this study, a set of standard agreements and notices has been compiled combining the better features of all existing forms and types. The result achieved consists of settlement agreement forms, each of which is entirely contained on one page and requires a minimum of insertions. These standard agreements are generally self-explanatory. However, where action additional to that outlined in a particular form is to be taken as part of the settlement, it may be necessary to retype the agreement to include the additional provisions.

There has also been evolved a standardized set of employer notices. It is suggested that wherever possible these standard notices for posting be copied on the employer's letterhead. If the mineographed notice itself is used, it may be necessary to retype it in those instances where additional action is being taken, the description of which does not lend itself readily to inclusion in the standard form.

It will be noted that no standard agreement or notice to cover 8 (2) settlements is included since it is believed advisable to settle such cases on the basis of a consent decree in almost every instance.

There is attached herewith a set of these new agreements and notices and there will soon be sent to each regional office a small supply of this material. Should more sets be necessary, they may be obtained on request. These new forms should be used in settlement of all cases wherever applicable and practicable. Please submit comments after they have been given a fair trial.

NLRB–282

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

——— REGION

Case No. ——

IN THE MATTER OF

AND

SETTLEMENT AGREEMENT

It is hereby agreed by and between the undersigned labor organization, herein called the UNION, and the undersigned Employer, herein called the EMPLOYER, in settlement of the above matter, as follows:

I. *Notice:* The Employer will post immediately in conspicuous places in and about its plant and maintain for a period of at least sixty (60) consecutive days from the date of posting copies of the Notice to All Employees attached hereto and made a part hereof. The Employer will comply with all of the terms and provisions of said Notice.

II. *Notification of compliance:* The Employer and the Union will each notify the Regional Director in writing within five (5) days and again after sixty (60) days from the date of

approval of this Agreement what steps the Employer has taken to comply herewith.

III. *Back pay:* The Employer will make whole the employees named in Exhibit "A" attached here to and made a part hereof, in the amount set opposite their names.[1]

IV. *Withdrawal:* The Union does hereby ask leave of the Regional Director to withdraw the charge in the above matter, such withdrawal to become effective when the Regional Director is satisfied that the provisions of this Agreement have been carried out.

V. *Approval:* This Agreement is subject to the approval of the Regional Director. Upon his approval, and contingent upon compliance with the terms and provisions hereof, no further action shall be taken in this matter.

Board Agent.

Approved_____194__

Regional Director.

NATIONAL LABOR RELATIONS BOARD.

(Employer)

By _____

(Representative) (Title)

(Union)

(Representative) (Title)

[1] This section to be stricken if no back pay is involved in settlement.

NLRB—283

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

_____ REGION

Case No. _____

IN THE MATTER OF

AND

SETTLEMENT AGREEMENT

IT IS HEREBY AGREED BY and between the undersigned Employer, herein called the Employer, and the undersigned Agent for the National Labor Relations Board, in settlement of the above matter, as follows:

I. *Notice:* The Employer will post immediately in conspicuous places in and about its plant and maintain for a period of at least sixty (60) consecutive days from the date of posting, copies of the Notice To All Employees attached hereto and made a part hereof. The Employer will comply with all the terms and provisions of said Notice.

II. *Refusal to issue complaint:* Upon the basis of this Agreement, the undersigned Regional Director shall decline to issue a complaint herein. A review of such action may be obtained pursuant to Article II, Section 9, of the Rules and Regulations of the National Labor Relations Board if a request for same is filed within seven (7) days. This Agreement is contingent upon the said Board sustaining the Regional Director's action in the event of a review.

III. *Performance:* Performance by the Employer with the terms and provisions of this Agreement shall commence immediately upon receipt by the Employer of advice that no

review has been requested or that the said Board has sustained the Regional Director. The Employer will notify the Regional Director in writing within five (5) days and again after sixty (60) days from the receipt of such advice what steps the Employer has taken to comply herewith.

IV. *Back pay:* The Employer will make whole the employees named in Exhibit "A" attached hereto and made a part hereof, in the amount set opposite their names.[1]

V. *Approval:* This Agreement is subject to the approval of the Regional Director.

Approved_____194____

_____
Regional Director.

NATIONAL LABOR RELATIONS BOARD.

_____

By_____
(Representative) (Title)

_____
Agent.

NATIONAL LABOR RELATIONS BOARD.

[Succeeding irrelevant forms have been omitted.]

3. Memorandum on settlements.

NATIONAL LABOR RELATIONS BOARD,
Washington, D. C., MAY 29, 1941.

To: All Regional Directors.

From: G. L. Patterson, Director of Field Division.

Subject: Statement of cases.

This memorandum supplements M–689 of October 13, 1938, and M–689–a of October 25, 1940.

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[1] This section to be stricken if no back pay is involved in settlement.

Some confusion seems to have arisen in some regions as to how to dispose of cases that are settled informally by agreements between the Regional Director and respondent where the charging party is unwilling to be a party to the settlement. In such situations the usual letter refusing to issue complaint should be sent to the charging party. The settlement agreement signed by the Regional Director and the respondent should contain a provision that such letter is being sent and that the entire agreement is subject to any action the Board may take on an appeal, if filed. The letter to the charging party should, of course, contain the usual reference to the right of review provided for in Article II, Section 9, of the Rules and Regulations.

U. S. GOVERNMENT PRINTING OFFICE: 1958